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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 255

SOL COHEN, ET AL., PETITIONERS

v.

CAULDWELL WINGATE CO., POIRIER & MCLANE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York (R. 129–130) is reported at 185 Misc. 389. The opinion of the Appellate Division of the Supreme Court of the State of New York (R. 145–146) is reported at 270 App. Div. 478. The judgment of the Appellate Division was affirmed by the Court of Appeals of the State of New York without opinion. 296 N. Y. 776.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on January 9,

1947 (R. 148–149). A motion for reargument, made on April 23, 1947, was denied on May 22, 1947 (R. 149). The petition for a writ of certiorari was filed on August 11, 1947. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether petitioners, employed solely as timekeepers or cost clerks by a contractor engaged in the construction, wholly in New York, of a new army encampment, under cost-plus contract with the United States, were "* * * engaged in commerce or in the production of goods for commerce * * *" within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*, are set forth in the Appendix, *infra*, p. 13.

STATEMENT

At all times material to this suit respondents, as joint-venturers, were engaged in the construction of new buildings, barracks and other facilities for an army camp located at Orangeburg, New York, and in the "rehabilitation of a dock" located at Piermont, New York, four miles from

the camp project (R. 55–56, 65–67, 111–112, 129).[1] Petitioners were employed at the camp project as cost clerks or timekeepers (R. 48, 67–68, 86–87, 129). They were paid at a straight hourly rate for a work-week of 48 hours, and were listed as administrative and non-manual personnel (R. 124–127, 129).

The duties performed by the timekeepers[2] consisted of checking the manual laborers and mechanics[3] "in" on the job in the mornings and checking them "out" in the evenings (R. 49–50, 53–54), performing "field checks" in order to determine whether or not the men were working on their assigned jobs (R. 51, 53), tabulating the results of their several field checks, and preparing records concerning the number of hours worked

[1] Respondents entered into a "cost-plus" contract with the War Department for the construction of this project, a staging area later known as Camp Shanks (R. 74, 129). Pursuant to this contract, the United States is, or may be, obligated to reimburse the contractors for money paid in resisting or settling claims arising out of work performed thereunder. Defense of this action was undertaken by the Department of Justice at the request of the War Department.

[2] Three petitioners were cost clerks and 113 were timekeepers (R. 70, 86–87).

[3] The men whose time they kept were "laborers, labor foremen, skilled mechanics such as plumbers, electricians, machine men, mechanics on the machines, bulldozer drivers, tractor drivers, oilers, wipers, office help in some of the shacks, cement men, plasterers, helpers to these various mechanics" (R. 54).

by each of these personnel (R. 49–50, 52, 54).[4] The work of the laborers and mechanics whose time they checked involved clearing and grading the camp site, laying foundations, erecting barracks and other buildings, constructing roads and other transportation facilities, installing electrical equipment and "rehabilitating" the Piermont dock (R. 55, 65, 67, 74–76, 84–86, 105–106).

The duties of the cost clerks were separate and distinct from those of the timekeepers, and consisted of preparing cost cards for the use of respondents' cost and progress department (R. 68–72). The cost records kept by these cost clerks pertained to the work of plumbers, carpenters, brick layers, and cement workers (R. 72–73).

The record discloses that petitioners kept the time of, or prepared cost cards with respect to, the work of men engaged solely in new and original work within the camp project (R. 54–55, 72–73). Although certain of the materials used in the camp construction were purchased from out of state sources (R. 76–80), petitioners neither handled nor checked such materials (R. 65, 81), nor did they keep the time records, or pay roll records, of the material checkers (R. 54, 65–66).

On the above facts,[5] the Supreme Court of New

[4] The timekeepers occasionally performed "special assignments" such as delivering emergency orders and messages to the men in the field (R. 52).

[5] Findings of fact by the trial judge were waived by stipulation of the parties (R. 47, 36a).

York gave judgment in favor of respondents in the suit, instituted by petitioners in that court under the Fair Labor Standards Act to obtain statutory overtime, liquidated damages, and counsel fees. Relying on *McLeod* v. *Threlkeld*, 319 U. S. 491, and similar decisions, the trial judge held that petitioners had not established that they were "* * * engaged in commerce or in the production of goods for commerce * * *" within the meaning of the statute (R. 129–130). This judgment was affirmed by the Appellate Division and by the Court of Appeals (R. 139–143, 150–151).

ARGUMENT

1. Petitioners seek to bring this case within the ambit of *Anderson* v. *Mt. Clemens Pottery Company*, 328 U. S. 680, by reference to a purported record-keeping requirement imposed on them by the New York courts and utilized as the means of defeating their claims (Pet. 7–12). The "crucial" question thus posed assumes an employer "* * * whose operations are both interstate and intrastate in character * * *", who fails to segregate the two activities, and whose employees, i. e., petitioners, perform work in connection with both (Pet. 7). No such question is involved herein. The New York courts plainly held that petitioners, timekeepers and cost clerks on local new construction work were not within the coverage of the Act (R. 129–130, 146). In so

holding, they invoked no novel doctrine and we submit that their judgments are correct.

This Court has stated that the problem presented by any coverage case under the Fair Labor Standards Act is one of "drawing lines". *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 523. Insofar as the needs of this case are concerned, the line has been sufficiently drawn. The record clearly shows, as recognized by the courts below, that respondents were engaged in new and original construction at Camp Shanks (R. 54–55, 72–73, 129, 146). It has been uniformly held that employees on such work are not "* * * engaged in commerce or in the production of goods for commerce * * *" within the meaning of the statute.[6] The result thus consistently reached by the lower federal courts is identical with the official interpretation of the Act by the Administrator of the Wage and Hour Division in connection with the same question of coverage. Interpretative Bulletin No. 5, Paragraph 12 (1944–1945 Wage and Hour Manual 23), Appendix, *infra,* p. 13. The Administrator's view, an important

[6] *Barbe* v. *Cummins Const. Corp.*, 135 F. 2d 667 (C. C. A. 4); *Noonan* v. *Fruco Const. Co.*, 140 F. 2d 633 (C. C. A. 8); *Parham* v. *Austin Co.*, 158 F. 2d 566 (C. C. A. 5); *Nieves* v. *Standard Dredging Corp.*, 152 F. 2d 719 (C. C. A. 1); *Scott* v. *Ford, Bacon & Davis, Inc.*, 55 F. Supp. 982 (E. D. Pa.); *Collins* v. *Ford, Bacon & Davis, Inc.*, 66 F. Supp. 424 (E. D. Pa.); *Wells et al.* v. *Ford, Bacon & Davis*, 7 Labor Cases, Par. 31, 929 (W. D. Ky.), aff'd. without opinion, 145 F. 2d 240 (C. C. A. 6); *Damon* v. *Ford, Bacon & Davis*, 62 F. Supp. 446 (E. D. Pa.).

guide in construing the statute (*Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140; *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 183), is particularly pertinent here since he has specifically referred to army barracks as illustrative of the type of new construction not within the statute. 1944–1945 Wage and Hour Manual 32–33, Appendix, *infra*, p. 15.

Petitioners seek to avoid the above described rulings on new construction employee coverage by copious reference to interstate movements of materials for respondents' work at Camp Shanks and to the linking of the camp to transportation and communication facilities (Pet. 8). Concededly, the Wage and Hour Administrator has stated that particular employees of new construction contractors, such as those "* * * engaged in transporting goods, machinery, or materials across state lines * * *" may come within the Act. Appendix, *infra*, p. 16. This, however, is not an exception from which petitioners can derive any comfort since they have never shown themselves to be in any way connected with possible interstate activities of respondents. Cf. *Englert* v. *S. Birch & Sons Construction Co.*, decided June 27, 1947 (C. C. A. 9), and cases cited therein. On the contrary, the record clearly shows, as we have stated, *supra*, p. 4, that petitioners kept the time of, or prepared cost cards with respect to, the work of men engaged solely in the new and

original construction involved in the camp project.[7] They had no connection with the interstate movement of materials nor with the men handling such interstate movements. We submit that the New York courts correctly discounted petitioners' random references to interstate movements of materials and connections with transportation facilities, and held that petitioners' employment related solely to the local construction project.

Petitioners advance, if they be held not to have been "* * * engaged in commerce * * *", an alternative argument to bring themselves within the statute, namely, that the construction of Camp Shanks fell within the category of "* * * production of goods for commerce * * *" (Pet. 4, 12–14). No such distinction in statutory categories of coverage can validly be made herein. New construction employees, such as petitioners, are neither engaged in commerce nor in the production of goods for commerce. Interpretative Bulletin No. 5, Paragraph 12, Appen-

[7] The status of new and original construction employees is not involved in the cases as to which petitioners assert a conflict (Pet. 4, 11–12). *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Fitzgerald Co.* v. *Pedersen*, 324 U. S. 720; *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178; *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680; *Guess* v. *Montague*, 140 F. 2d 500 (C. C. A. 4); and *Skidmore* v. *Casale*, 160 F. 2d 527 (C. C. A. 2). These cases involve at most repair or construction work in connection with existing interstate activities, a type of situation clearly distinguished by the Wage and Hour Administrator from the new construction situation presented herein. Appendix, *infra*, pp. 14–18.

dix, *infra*, p. 13; see cases cited in fn. 6, *supra*, p. 6. This rule clearly covers petitioners' status in connection with the construction of Camp Shanks itself. Nor is their status changed by suggestions that the construction of Camp Shanks was "necessary" to the production of goods for commerce (Pet. 12–14). We do not believe it necessary, in connection with this contention, to examine the distance between petitioners' duties, narrow in scope and terminated with the completion of the construction project, and the subsequent use of the camp by the Army. *10 East 40th St. Co.* v. *Callus*, 325 U. S. 578, 582; *Wilson* v. *Reconstruction Finance Corp.*, No. 1062, Oct. Term, 1946, Br. in Opp., pp. 7–8. For it is apparent that Army utilization of the completed camp as a staging or embarkation area for troops was not the production of goods for commerce.

2. We suggest that the petition for certiorari herein was not seasonably filed. The judgment of the Court of Appeals was entered on January 9, 1947 (R. 148).[8] This judgment was final. *Department of Banking* v. *Pink*, 317 U. S. 264. The three-month period within which petitioners could apply to this Court for certiorari, accordingly, began to run on January 9, 1947, and expired on April 9, 1947. 28 U. S. C. 350. Petitioners took

[8] The remittitur was dated January 10, 1947, and judgment was entered thereon in the Supreme Court on January 20, 1947 (R. 148, 151–152).

no steps to toll or suspend the running of the three-month period prior to its expiration on April 9, 1947. *Department of Banking* v. *Pink*, 317 U. S. at 266; *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498. It is thus clear that petitioners had lost their right to apply for certiorari after April 9, 1947 unless the right was revived by their subsequent motion. Cf. *Matton Co.* v. *Murphy*, 319 U. S. 412, 415; *Credit Co.* v. *Arkansas Central Railway*, 128 U. S. 258, 261.

On April 23, 1947, after the period for filing a petition for certiorari had expired, petitioners served notice upon the United States Attorney that they were going to request the Court of Appeals to recall the remittitur and to issue an order granting to petitioners leave to reargue.[9] In ac-

[9] The dates on which this motion was noticed and made are shown in the Department's files. They are not contained in the record nor set forth in the petition. For the convenience of the Court, the body of the "Notice of Motion for Reargument" is here set forth:

Sir:

PLEASE TAKE NOTICE that upon the record and all the proceedings heretofore had in this case, and upon the order of this Court dated January 9, 1947, affirming the judgment herein of the Appellate Division which affirmed the judgment for defendants herein entered by the Supreme Court, Bronx County, the undersigned will move this Court at the Court of Appeals Hall, Albany, New York on May 12, 1947, at 2 o'clock in the afternoon for a recall of the remittitur and for an order granting to plaintiffs-appellants leave to reargue the decision of this Court affirming without opinion the judgment herein of the Appellate

cordance with Rule XX of the Rules of the Court of Appeals, the motion was submitted without oral argument.[10] The motion for leave to reargue was denied on May 22, 1947 (R. 149). In these circumstances, it is clear that the Court of Appeals did not "entertain" petitioners' motion for leave to reargue (*Fosdick* v. *Town of Hempstead,* 126 N. Y. 651) and that the finality of that court's judgment of January 9, 1947, was never suspended. *Department of Banking* v. *Pink,* 317 U. S. at 266; *Pfister* v. *Finance Corp.,* 317 U. S 144, 149–150; *Bowman* v. *Loperena,* 311 U. S. 262, 266; *Gypsy Oil Co.* v. *Escoe, supra; Morse* v. *United States,* 270 U. S. 151. Accordingly, we submit that the petition herein was not seasonably filed and should be dismissed for want of jurisdiction.

Division and for such other and further relief as to the Court may seem proper.

Dated, New York, April 23, 1947.

Yours, etc.,

* * * * *

[10] Rule XX of the Rules of the Court of Appeals provides:

Motions for reargument.

Motions for reargument must be submitted on printed briefs (eighteen copies) without oral argument, on five days' notice to the adverse party, stating briefly the ground upon which a reargument is asked, and the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the case and to the authorities relied upon. A copy of the brief shall be served on the adverse party with the notice of motion.

CONCLUSION

For the reasons set forth above, the petition for certiorari herein should be denied or dismissed.

Respectfully submitted.

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SEPTEMBER 1947.

APPENDIX

1. The Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 (29 U. S. C. 201, *et seq.*) provides in part:

> SEC. 7 (a). No employer shall, * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *
>
> (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

2. Paragraph 12 of Interpretative Bulletin No. 5 provides:

> The question arises whether the employees of builders and contractors are entitled to the benefits of the Act. The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across State lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce. There may be particular employees of such construction contractors, however, who engage in the interstate transportation of materials or other forms of interstate commerce and are for that reason entitled to the benefits of the Act.

3. 1944–1945 Wage and Hour Manual, pp. 32–33 provides:

> Application to Individual Industries—Building and Construction
>
> *Statement by Wage and Hour Division summarizing rulings on construction operations*
>
> Key to the Division's position lies in the fact that it regards the reconstruction, maintenance or repair of buildings used to produce goods sold across state lines as work necessary to the production of goods for commerce within the meaning of the Act. New construction, however, is usually not considered subject to the law unless the construction is "an integral part of the production of a specific type of goods for commerce."
>
> The distinction between original construction and reconstruction, together with the exceptions made by the Division to its general ruling, is explained, with clarifying examples, in the opinion which follows in full:
>
> APPLICABILITY OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES OF BUILDING AND CONSTRUCTION CONTRACTORS
>
> The opinions of the Wage and Hour Division regarding the applicability of the Fair Labor Standards Act to employees of building and construction contractors are set forth in paragraphs 12 and 13 of Interpretative Bulletin No. 5. Because of a number of requests for information which we have received in recent months regarding the applicability of the Act to the types of employees described therein we feel it advisable to clarify the principles stated in

these paragraphs in their applicability to certain situations which have been called to our attention.

1. THE GENERAL CONSTRUCTION OF BUILDINGS

A. General

It is stated in paragraph 12 of Interpretative Bulletin No. 5 that "The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across State lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the act, even if the buildings when completed will be used to produce goods for commerce. There may be particular employees of such construction contractors, however, who engage in the interstate transportation of materials or other forms of interstate commerce and are for that reason entitled to the benefits of the act."

B. Typical examples of no coverage

Typical cases of original construction of building in which it is the opinion of the Wage and Hour Division that the Fair Labor Standards Act, has no application are those of employees engaged in the original construction of homes, apartments, churches, schools and army barracks. Moreover, it is the Division's opinion, as pointed out in paragraph 12, that generally employees engaged in the original construction of buildings are not within the coverage of the Act even though the buildings when completed will be used to produce goods for commerce.

C. Contractor working in more than one state

The mere fact that a construction contractor performs construction work in several states would not affect the status of his employees under the Act if such employee would not otherwise be within its coverage. A typical case would be one in which a construction contractor maintained his principal office in state A and contracted to erect homes and apartment houses in states B and C. Unless the employees engaged in construction in states B and C were engaged in transporting goods, machinery, or materials across state lines, or in other forms of interstate commerce, their employment would not be subject to the Act.

D. Situations involving original construction where such construction is an integral factor in the production of goods for commerce and intimately related thereto

While it is stated in paragraph 12 of Interpretative Bulletin No. 5 that employees engaged in the original construction of buildings are not generally within the scope of the Act, it should not be inferred from this statement that no employees engaged in the original construction of any structure would fall within the coverage of the Act. In the opinion of the Division, employees engaged in the original construction of structures, where such construction must practically be viewed as an integral part of the production of a specific type of goods for commerce, are covered by the Act.

Thus, for example, employees engaged in the original construction of oil derricks and in related construction activities are en-

gaged in processes or occupations necessary to the production of goods within the meaning of Section 3 (j) of the Act. An oil derrick is erected solely to the end of conducting the subsequent drilling operations as a direct result of which the oil is to be produced. When it is considered that such a derrick, when once erected, cannot conceivably serve any other productive purpose, it becomes apparent that the construction thereof is properly to be regarded as an integral step in the actual drilling operations. It is distinguishable from the construction of a factory building which is intended to produce specific types of commodities. The utility of such a factory building is not limited to the production of the commodity originally contemplated. There are numerous instances in which, because of economic factors, such as fluctuations in the demands for various factory products, plants have been remodeled, new machinery installed, and commodities entirely different from those originally contemplated have been produced. This obvious distinction urges us to the conclusion that employees who construct an oil derrick should be viewed as engaged in the process of production, but that employees who construct a building in which goods for commerce are to be produced should be regarded as a step removed from actual productive operations. For the same reason as is applicable to oil derrick construction, such operations as clearing land, digging pits, and building certain earthen fire walls, in connection with oil drilling operations are properly to be regarded as within the general coverage of the Act.

The application of the general principle expressed above is limited to the original construction of oil derricks and related construction activities. The situation in which an oil derrick is constructed has been discussed merely to illustrate the operation of the general principle within which it falls.

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